(16)

Office - Supreme Court, U. S.
FILED
AUG 24 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 286

AL N. FOX and MAX FOX,

Petitioners and Appellants below,

against

UNITED STATES OF AMERICA,

Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

MAX SCHWARTZ,
ALBERT LYONS,
Attorneys for Petitioners,
Offices respectively at
26 Court Street,
Brooklyn, N. Y.,
and
84 William Street,
New York City.

CORPORATE PRESS, INC., NEW YORK CITY

INDEX

	PAGE
PETITION	1
Summary Statement of the Matter Involved	1
Questions Presented	3
Jurisdiction	6
Reasons Relied on for the Allowance of the Writ	6
BRIEF	9
Opinion of the Courts Below	9
Jurisdiction	9
Statement of the Case	10
Specification of Errors	10
Statutes and Regulations Involved	11
Argument	11
Conclusion	17
Appendix	18

Cases Cited

	PAGE
Adler v. U. S., 182 Fed. 464	16
In re Barnett, 124 Fed. (2d) 1005	17
Brasfield v. U. S., 272 U. S. 448	17
Brunov v. U. S., 308 U. S. 287	17
Christian v. B. M. R. R., 109 Fed. (2d) 103	17
Crawford v. U. S., 212 U. S. 183	17
De Jianne v. U. S., 282 Fed. 737	16
Eckert v. U. S., 7 Fed. (2d) 257	15
Falcone v. U. S., 311 U. S. 205	13, 14, 15
Fort Dodge Hotel Co. v. Bartelt, 119 Fed. (2d) 253	17
Frantz v. U. S., 62 Fed. (2d) 737	16
Gebardi v. U. S., 287 U. S. 112	13
Keliher v. U. S., 193 Fed. 8	16
Kreiner v. U. S., 11 Fed. (2d) 722	16
Marcante v. U. S., 49 Fed. (2d) 156	12
Mattox v. U. S., 146 U. S. 140	17
McCandless v. U. S., 298 U. S. 342	17
McElroy v. U. S., 164 U. S. 76	12, 13
Meadows v. U. S., 82 Fed. (2d) 881	17
Moore v. U. S., 224 Fed. 95	16
N. Y. C. R. Co. v. Johnson, 279 U. S. 310	17
Owen v. Owen, 22 Iowa 270	16
People v. Odell, 230 N. Y. 481	16
Schilling v. Delaware & H. R. Corp., 114 Fed. (2d) 69	17
Tellman v. U. S., 67 Fed. (2d) 716	12
Terry v. U. S., 7 Fed. (2d) 28	12
U. S. v. Atkinson, 297 U. S. 157	17
U. S. v. Byers, 73 Fed. (2d) 419	14
U. S. v. Dickerson, 18 Fed. (2d) 887	13
U. S. v. Dietrich, 126 Fed. 664	13
U. S. v. Groves, 122 Fed. (2d) 87	12
U. S. v. Katz, 271 U. S. 354	13
U. S. v. Koch, 113 Fed. (2d) 982	13
U. S. v. Lotsch, 102 Fed. (2d) 35	12
U. S. v. McConnell, 285 Fed. 164	12

	PAGE
U. S. v. N. Y. Central & H. R. R. Co., 146 Fed. 298	13
U. S. v. Pandolfi, 110 Fed. (2d) 113	13
U. S. v. Peoni, 100 Fed. (2d) 401	13
U. S. v. Quick, 128 Fed. (2d) 832	16
U. S. v. Sager, 49 Fed. (2d) 725	13
U. S. v. Silva, 109 Fed. (2d) 531	12
U. S. v. St. Pierre, 132 Fed. (2) 837	17
U. S. v. Wills, 36 Fed. (2d) 855	12
U. S. v. Zeuli (CCA, 2d Circuit, decided August 2, 1943, presently unreported)	13
Van Gorder v. U. S., 21 Fed. (2d) 939	17
Wiborg v. U. S., 163 U. S. 632	17
Wilmington Mining v. Fulton, 205 U. S. 60	17
Wyatt v. U. S., 23 Fed. (2d) 791	12
Young v. U. S., 48 Fed. (2d) 26	13

Statutes and Regulations Cited

United States Code, Title 18, Section 88	18
United States Code, Title 26, Section 2550 (a)	18
United States Code, Title 26, Section 2551 (a)	18
United States Code, Title 26, Section 2553	19
United States Code, Title 26, Section 2554 (a), (c), (2), (d), (f) and (g)	20
United States Code, Title 26, Section 2557 (b), (1), (2)	21
United States Code, Title 26, Section 3220 (a), (b), (c), (e) and (f)	22
United States Code, Title 26, Section 3221 (a)	23
United States Code, Title 26, Section 3224 (a), (b) and (c)	23
United States Code, Title 28, Section 391	16
Treasury Regulations No. 5 (1938) as follows:	
Article 3	24
Article 15	24
Article 25	25
Article 62	25
Article 90 (5)	25
Article 167	25
Article 182	26
Article 183	26
Article 185	26
Article 201	27

Supreme Court of the United States

OCTOBER TERM, 1943

No. ....

AL N. FOX and MAX FOX,
Petitioners and Appellants below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Supreme Court of the United States:

The petition of Al N. Fox and Max Fox respectfully shows:

I.

Summary Statement of the Matter Involved.

Petitioners were convicted by a jury after a trial in the United States District Court for the Southern District of New York upon an indictment (R. 10-33) charging them together with eighteen other defendants with conspiracy to violate the Internal Revenue Laws in connection with the manufacture, sale and general illegitimate use of and traffic in narcotics.

Said petitioners Al N. Fox and Max Fox were each sentenced to serve a term of a year and a day and to pay a fine of $1,000.

The petitioners herein appealed to the United States Circuit Court of Appeals for the Second Circuit upon various grounds fully set forth in the Assignments of Error (R. 862-871).

In the interest of brevity we shall summarize such of the grounds which were relied on below and which will be relied on in this Court if this petition is granted. Said grounds are as follows:

1. The evidence failed to prove the petitioners guilty of the crime charged.

2. The conspiracy charged in the indictment in a single count and under the proof actually embraced several different conspiracies, different in personnel as well as in content and there was therefore, a misjoinder.

3. There was a fatal, harmful variance between allegation and proof.

4. The judge's colloquial charge was obscure, unenlightening and wholly inadequate to enable the jury to arrive at a result by a process of intelligent discrimination.

5. The trial was unfair.

While the Assignments of Error are very broad and detailed, in substance and effect the foregoing constitutes a fair summary of so much thereof as are now relied upon. It should be noted that at the end of the government's case and of the entire case as well as throughout the trial appropriate motions were made under which these grounds may be subsumed. The trial judge, to conserve time, gave

every defendant the benefit of every motion made whether made by him or by another defendant (R. 28, 29, 340, 600-610, 611, 757, 767, 770).

Questions Presented.

1. Was it proper to combine in one indictment and offer in support thereof proof of four different conspiracies all of which were different as to content, two of which were separate as to personnel and ~~three~~ one of which even if proved would constitute no crime? The four conspiracies, each of which the government contended was criminal, were as follows:

A. To manufacture morphine synthetically.

B. To extract narcotics for illegitimate use from tax exempt narcotic preparations.

C. To divert opium. This requires some amplification. The plan charged was that sales of lead and opium wash would be made from the manufacturers (defendant Londoner's concern) through jobbers as selling agents (the petitioners herein Al N. Fox and Max Fox) to retail druggists defendants Cohen, Mainella and others) and then the druggists would sell to defendant Liss and he, Liss, would return the lead and opium wash to Londoner. The theory was that Londoner would use the same lead and opium wash and put it through the same course of sales. He would then be able to show in his return to the Government the manufacture and sale of quantities of lead and opium wash more than was actually the case and thus he would be in a position to secure additional opium to be put into the illegitimate market.

D. To sell lead and opium wash in violation of regulations limiting its sale to non-medicinal pur-

poses, requiring the keeping of records and providing that all dealers must be registered.

The Fox petitioners, had no connection with conspiracy A and B. See opinion of the Circuit Court of Appeals (R. 900 and 902). Conspiracy A, if successful, would not constitute a crime. See opinion of the Circuit Court of Appeals (R. 900).

Conspiracy C failed utterly of proof. See opinion of the Circuit Court of Appeals (R. 900-901-902). A vital link was missing, namely, it was never shown directly or indirectly that the lead and opium wash was returned or intended to be returned to Londoner.

2. Was there not a harmful and fatal variance between allegation and proof because of what has hereinbefore been set forth, and by reason of the following further contentions?:

A. The jury may have confused the issues.

B. The jury may have applied all the evidence indiscriminately and cumulatively against each petitioner whereas substantial parts of said evidence related to conspiracies to which these petitioners were not a party, and substantial portions of said evidence related to conspiracies which constitute no crime and to conspiracies which utterly failed of proof. Conspiracy A constituted no crime. Conspiracy C utterly failed of proof.

3. Was not the judge's colloquial charge obscure and unenlightening to a point where because of all the foregoing it prevented the jury from intelligently considering the case?

4. Was not the trial unfair because of number 3 directly hereinbefore set forth, as well as on the following additional grounds to wit?:—the trial judge plainly exhibited bias toward the government and against the defendants.

He often undertook the examination of government witnesses and cross examined the defendants and their witnesses. He belittled, personally attacked and generally exhibited an adverse partisan attitude towards the defendants and their counsel. In this connection we respectfully refer the court to the following pages in the Record: 53, 54, 79, 80, 109, 110, 160-162, 165, 167-174, 218, 219, 226, 229, 232, 234, 237-239, 245-249, 250, 259, 260, 261-275, 281, 282, 287, 288, 291, 293, 295, 296, 298-300, 302, 314, 354-357, 362, 363, 377-379, 449-451, 460, 556, 557, 570, 571, 609-611, 672-675. We make the observation that while no single instance suffices, all the incidents together warrant the presentation of this question No. 4. Reference to these pages is not intended to be exhaustive. They are merely illustrative. It is only by reading the entire record that this Court can gain a full appreciation of the extent to which the trial judge injected himself into the case in the matter of examining and cross examining witnesses and of guiding the case in and espousing the government's interest.

5. Was not the evidence insufficient to connect the petitioners with and to support conspiracy D by virtue of the principles that where sales are legitimate (i. e., the sale from Londoner through the Foxes, to the druggists) the seller cannot be linked with the purchaser in a conspiracy because the purchaser intends a criminal use of the articles sold and that if a crime (here the sale) involves the mutual cooperation of two persons who in fact have committed the crime they may not be convicted of a conspiracy to commit it? Clearly the sales from Londoner through the Foxes to the druggists were legitimate. The sellers had permits to sell, the druggists had permits to buy and the Circuit Court, in its majority opinion at the end thereof, indicated that records were kept or at least there was no proof that they were not kept. (See discussion & reference to the Record pages hereinafter set forth at pages 13-14.)

II.

Jurisdiction.

A.

The United States Circuit Court of Appeals for the Second Circuit made its order for mandate herein on August 3, 1943 (R. 933).

B.

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. Code, Sec. 347, subd. a and c and Rule 38 of the revised rules (1939) of the Supreme Court of the United States.

C.

The reasons directly hereinafter set forth constitute valid grounds for invoking the jurisdiction of this Court.

III.

Reasons Relied on for Allowance of the Writ.

The decision of the Circuit Court of Appeals is in direct conflict with the applicable law established by the Supreme Court of the United States and by various Circuit Courts of Appeal throughout the country.

The principles of law insofar as they apply to the case at bar are as follows:

1. It is improper to combine under one single count indictment and offer proof of four different conspiracies all of which are different as to content, two of which are separate as to personnel, two of which utterly failed of proof and one of which, if proved, constituted no crime.

2. Such a combination and joinder plus the failure of proof creates a variance which is harmful and fatal, particularly so where the judge's charge to the jury is of a colloquial, obscure and unenlightening nature, and inadequately provides a basis for intelligent, discriminating judgment on the part of the jury.

3. A charge to the jury as herein described is tantamount to an unfair trial.

4. In addition to and in connection with the foregoing the trial was unfair, because the trial judge plainly exhibited bias toward the government and against the defendants. He often undertook the examination of government witnesses and cross examined the defendants and their witnesses. He belittled, personally attacked and generally exhibited an adverse partisan attitude towards the defendants and their counsel.

5. Where there is a sale of an article which the buyer intends to use illegally the seller cannot be indicted with the buyer for conspiracy to make the illegal use. This even though the seller may know of the alleged illegal use of the subject of the sale. Certainly if the seller does not know. Furthermore if the sale is a crime it involves the mutual cooperation of two persons and if these two in fact have committed the crime they may not be convicted of a conspiracy to commit it.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, directing said Court to certify and send to this Court a full and complete transcript of the records and proceedings of the said Circuit Court had in the case numbered and entitled on its docket No. 1863, calendar No. 223, *United States of America*, Appellee v. *Jack Liss*, Appellant, to the end that

the case may be reviewed and determined by this Court as provided for by the statute of the United States; and that judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such other and further relief as to this Court may seem proper.

Dated, August 20, 1943.

AL N. FOX,
MAX FOX,

By Max Schwartz,
Counsel for Petitioners.